

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2002-093045

07/29/2005

HONORABLE JAMES H. KEPPEL

CLERK OF THE COURT
H. Cameron
Deputy

FILED: 08/01/2005

STATE OF ARIZONA

JEANNETTE GALLAGHER

v.

ALAN MARCEL SOJKA (A)

GARY J BEVILACQUA
JOSEPH A STAZZONE

JUDGE MCCLENNEN
VICTIM SERVICES DIV-CA-SE

MINUTE ENTRY

The Court has considered Defendant's Rule 10.1 Motion for Change of Judge with Accompanying Affidavit, the State's Response to Motion for Change of Judge with attachments and Defendant's Reply to State's Response to Motion for Change of Judge. The Court has further considered the oral argument of counsel. Defendant raises three bases for his request of Change of Judge to wit:

- 1) Judge McClennen's personal views regarding Defense counsels' personal beliefs and practices regarding capital litigation;
- 2) Judge McClennen's tone and demeanor of his communications with the parties to the proceedings; and
- 3) Judge McClennen's rulings on issues of mitigation preclusion, Defense disclosure of precluded mitigation information and Defense request for review of case evidence that is in the exclusive possession or control of the State.

Rule 10.1, Arizona Rules of Criminal Procedure, allows for a Change of Judge "if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned Judge." In *State v. Thompson*, 150 Ariz. 554, 724 P.2d 1223 (Ariz App 1986), the Court of Appeals noted as follows:

"...[T]here is a presumption of impartiality by the trial Court and burden is on the party seeking recusal to prove bias or prejudice by a preponderance of the evidence.

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The party seeking recusal must show how any proclivity on the part of the trial Court prejudiced him.”

In this case, the Court notes that Defense counsel alleges antagonism between trial counsel and the trial Judge. It is well settled that antagonism between trial counsel and the trial Judge is insufficient to support a recusal motion. *State v. Curry* (App.Div. 1 1996) 187 Ariz 623, 931 P.2d 1133, review and cross-review denied. The Court has reviewed the record provided by counsel with regard to the allegations raised in Defendant’s Motion and finds, based upon said record, that there is an absence of proof which would support a conclusion that Judge McClennen has a hostile feeling or spirit of ill-will toward the Defendant. The Court finds from the record that there has been a failure of the Defendant to prove by preponderance of the evidence that Judge McClennen is biased or prejudiced against the Defendant. Defendant having failed to sustain his burden of proof,

IT IS ORDERED denying the Rule 10.1 Motion for Change of Judge.

IT IS FURTHER ORDERED returning the matter to Judge McClennen for all further proceedings in accordance with this order.